

would render useless a grant or other positive disposition of the application.” In establishing the fee collection program, the Commission elaborated on the meaning of this provision:

Section 1.1111(a)(4) [the earlier version of Section 1.1113(a)(4)] is intended to apply in those rare instances where the Commission creates a new regulation or policy, or the Congress and President approve a new law or treaty, that would make the grant of a pending application a *legal nullity*. We believe that this rare event would justify the return of an application because the action of a government entity would make the requested action *impossible* without regard to the merits of that application.

Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985, *Report and Order*, 2 FCC Rcd. 947, para. 17 (1987) (*1987 Fee Order*) (*emphases added*). See also *Ranger Cellular and Miller Communications, Inc.*, 348 F.3d 1044 (D.C. Cir. 2003), (upholding a Wireless Telecommunications Bureau decision citing this language).

The Commission adopted the *First Space Station Licensing Reform Order* in May 2003 to put in place licensing procedures that would allow faster service to the public, while maintaining adequate safeguards against speculation.<sup>19</sup> As noted above, the Commission adopted two new satellite space station licensing procedures in the *Order*. The Commission also adopted additional provisions intended to make the satellite application process more efficient, including setting a required bond amount (\$5 million for GSO-like licensees and \$7.5 million for NGSO-like licensees)<sup>20</sup> and adding additional milestone requirements for all satellite services.<sup>21</sup>

We do not agree that these provisions require that we make a refund of Spectrum Astro’s application fees under Section 1.1113(a)(4). You cite the *Streamlining of Radio Technical Rules* and the *Part 90* proceedings in support of your assertion that pursuant to Section 1.1113(a)(4), “the Commission has refunded filing fees to applicants that withdrew their applications after the Commission adopted new procedural or operational rules.”<sup>22</sup> These cases, however, are clearly distinguishable from the circumstances here. Unlike here, in the cases you cite, the Commission made a specific determination that the rules changes it made in the proceeding were significant enough to trigger Rule 1.1113(a)(4) with respect to certain pending applications.

In the *Streamlining of Radio Technical Rules* proceeding, the Commission granted refunds pursuant to Rule 1.1113(a)(4) because the applications themselves were reclassified to a lower-cost fee category. In this proceeding, the Commission made several changes to streamline radio technical rules, as part of the Commission’s 1998

<sup>19</sup> *First Space Station Licensing Reform Order*, 18 FCC Rcd at 10865, para. 279.

<sup>20</sup> *Id.* at 10,825, para. 168.

<sup>21</sup> *Id.* at 10,827-10,838, paras. 173-208.

<sup>22</sup> See Jacobs Letter at 4 & n. 11.

biennial regulatory review.<sup>23</sup> Among the changes made was a change to expand the definition of “minor change” in the AM, the reserved frequency noncommercial educational FM (NCE FM), and the FM translator facilities to conform more closely to the commercial FM definition.<sup>24</sup> This would allow licensees to make changes that were “fundamentally technical and minor in nature” – such as changing the power, the frequency, or the antenna height or location – as long as the NCE FM and FM translator stations did not abandon their present service areas.<sup>25</sup> This reclassification meant that the applications would no longer be subject to a number of statutory requirements, including being subject to a 30-day public notice period in which petitions to deny and mutually exclusive applications could be filed.<sup>26</sup> With respect to pending applications, the Commission stated that major change applications subject to reclassification would be reclassified automatically as minor changes,<sup>27</sup> and that “[a]pplicants whose applications are so reclassified may seek refund of the difference between fees paid for major and minor change application processing, . . . and will be deemed entitled to such refunds under 47 C.F.R. § 1.1113(a)(4).”<sup>28</sup>

In the *Part 90* proceeding, the Commission specifically found that certain rule changes imposed on a small subset of “special” applicants -- as opposed to the global changes made in the *First Space Station Licensing Reform Order*– were significant enough to trigger Rule 1.1111(a)(4). In 1991, the Commission adopted rules to encourage the development of spectrally efficient narrowband technologies in the 220-222 MHz band.<sup>29</sup> In the 220 band, thirty of the sixty nationwide channels were set aside for non-commercial users, *i.e.*, licensees who use the channels for their own internal purposes.<sup>30</sup> The Commission noted that “in contrast to the commercial nationwide authorizations which will be used by the licensees’ numerous customers, the non-commercial channels . . . will be used almost exclusively by four licensees.”<sup>31</sup> The Commission recognized the “special status of the non-commercial nationwide

<sup>23</sup> 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Part 73 and 74 of the Commission’s Rules, *First Report and Order*, 14 FCC Rcd. 5272 (1999).

<sup>24</sup> *Id.* at 5272, para. 1.

<sup>25</sup> *Id.* at 5274, para. 3.

<sup>26</sup> *Id.* at para. 3, n. 8.

<sup>27</sup> *Id.* at 5284, para. 20. The Commission noted that the applications would not be automatically reclassified if there were mutually exclusive applications filed prior to the effective date of the *Order* or if petitions to deny were filed against the applications. Those applications would be processed under existing procedures. *Id.*

<sup>28</sup> *Id.* at para. 20, n. 51. The Commission noted that AM and FM translator applicants with major change applications on file were subject to the temporary freeze that the Commission imposed on the processing of all major change applications in all commercial broadcast and secondary broadcast services while the Commission was transitioning to competitive bidding procedures pursuant to the Balanced Budget Act of 1997. The Commission stated that these applicants could request dismissal of their major change applications and receive a refund pursuant to Rule 1.1113(a)(4) and resubmit minor change applications. *Id.* at para. 20 & para. 20, n. 53.

<sup>29</sup> Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, *Report and Order*, 6 FCC Rcd. 2356 (1991).

<sup>30</sup> *Id.* at para. 2.

<sup>31</sup> Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, *Memorandum Opinion and Order*, 7 FCC Rcd. 4484, para. 23 (1992) (220 MO&O).

channels,"<sup>32</sup> noting that that non-commercial licensees "do not compete for customers and have no incentive to extend service to users and may in fact have an incentive to apply for a greater amount of spectrum than necessitated by their current demands in anticipation of future growth."<sup>33</sup> In order to narrow the non-commercial pool of applicants to only those entities with the greatest interest and demonstrated capability to develop a non-commercial nationwide communications system,"<sup>34</sup> the Commission adopted stricter operating and construction standards.<sup>35</sup> The Commission found that these changes "significantly altered the construction and operational requirements applicable to the non-commercial nationwide channels" and "anticipated that certain applicants may be unable to satisfy our licensing prerequisites or may otherwise no longer be interested in applying."<sup>36</sup> The Commission interpreted Rule 1.1111(a)(4) to permit refunds for application fees paid by applicants who wanted to withdraw their applications but made clear that "[r]efunds will be given to non-commercial applicants only."<sup>37</sup>

The circumstances of the *Streamlining of Radio Technical Rules* and the *Part 90* proceedings can be easily distinguished from the circumstances here. In each of these cases, the Commission specifically found that the changes to the rules were significant enough to trigger Rule 1.1113(a)(4). In these cases, the previous applications were rendered a nullity because the applications themselves were reclassified or because a special subset of applicants could not meet the new stringent license requirements. In contrast, in the *First Space Station Licensing Reform Order*, the Commission did not find that the rule changes -- such as the bond-posting and milestone requirements -- were significant enough to automatically trigger Rule 1.1113(a)(4) with respect to the pending V-band and KA-band applications.<sup>38</sup> The Commission suggested that if the pending

<sup>32</sup> Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, *Further Notice of Proposed Rulemaking*, 7 FCC Rcd. 898, para. 6 (1992) (220 Further Notice).

<sup>33</sup> 220 MO&O, 7 FCC Rcd. 4484 at para. 23.

<sup>34</sup> 220 Further Notice at para. 6.

<sup>35</sup> 220 MO&O, 7 FCC Rcd 4484 at paras. 23-29. Specifically, the Commission amended the rules to (1) require nationwide non-commercial licensees to construct at least one base station in a minimum of 70 markets within five years rather than ten years of licensing; ... (2) prohibit the transfer or assignment of nationwide non-commercial licenses during the entire first ten-year license term rather than after 40 percent of the licensee's system had been constructed; (3) require non-commercial nationwide applicants to demonstrate an actual presence or long-term business plan that necessitates internal communications capacity in the 70 or more markets identified in the license application; ... [and (4)] provide that non-commercial, nationwide licensees may lease excess capacity on their systems five years after license grant [rather than after 40 percent of the system has been constructed].

*Id.* at paras. 24, 28-29. Later the Commission amended the third prong to eliminate the long-term business plan showing option and require that applicants demonstrate an actual presence in 70 or more markets. The Commission found that that change also triggered Rule 1.1111(a)(4) because it "represent[ed] a significant change in the entry criteria." Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Services, *Order*, 8 FCC Rcd. 4161, para. 10, n. 28 (1993).

<sup>36</sup> *Id.* at n. 66.

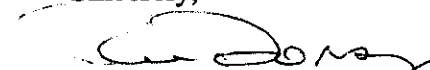
<sup>37</sup> *Id.*

<sup>38</sup> See *First Space Station Licensing Reform Order* at para. 282.

applications had been subject to the first-come first served procedure where an earlier-filed application would make it impossible to grant its application, then Rule 1.1113(a)(4) would have been applicable.<sup>39</sup> In addition, the Commission noted that it would consider fee refunds pursuant to its rules (such as Rule 1.1113(a)(4)) where the individual circumstances make such action appropriate.<sup>40</sup> But in light of the fact that the Commission did not make a specific finding that the changes adopted in the *First Space Station Licensing Reform Order* automatically triggered Rule 1.1113(a)(4), an applicant seeking an application fee refund must make a specific showing that these changes nullify its application. Spectrum Astro did not make this showing here.

In sum, you have not demonstrated the existence of compelling and extraordinary circumstances necessary to justify a waiver of the application fee requirement and refund of the fee, pursuant to Rules 1.1117(a) and 1.1113(a)(5). Nor have you demonstrated that Rule 1.1113(a)(4) supports the grant of your refund request. Accordingly, we deny your request. If you have any questions concerning this matter, please contact the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,



Mark A. Reger  
Chief Financial Officer

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<sup>39</sup> See *Id.*

<sup>40</sup> Indeed, we did find, pursuant to Rule 1.1113(a)(4), that a refund was appropriate for applications withdrawn because of the rule adopted in the *Space Station Licensing Reform Order* limiting the number of applications and unbuilt satellite systems that any one applicant can have pending in a frequency band. See Letter to Peter A. Rohrbach, Karis A. Hastings, and David L. Martin, Counsel for SES AMERICOM, Inc., from Mark A. Reger (March 10, 2005). Spectrum Astro is not entitled to a refund on this basis, however, because it applied for only five GSO satellites. See *Space Station Licensing Reform Order* at 226-233; 47 CFR § 25.159.

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C. 20554

November 3, 2005

Adama

OFFICE OF  
MANAGING DIRECTOR

Albert H. Kramer, Esq.  
Jacob S. Farber, Esq.  
Dickstein Shapiro Morin & Oshinsky, LLP  
2101 L Street, N.W.  
Washington, D.C. 20037-1526

Re: Startec Global Operating Company  
FYs 2001, 2002, 2003 Regulatory Fees  
Fee Control No. 00000RROG-05-059

Dear Counsel:

This letter responds to your request dated July 8, 2005, filed on behalf of Startec Global Operating Company (Startec) for a waiver of the regulatory fees for interstate telecommunications service providers for fiscal years (FYs) 2001, 2002, and 2003, and the associated late payment penalties. . Your request for a waiver of the regulatory fees for FYs 2001 and 2002 is denied. Your request for a waiver of the regulatory fees for FY 2003 is granted.

In your request, you recite that Startec filed a voluntary petition for Chapter 11 bankruptcy reorganization in the United States Bankruptcy Court for the District of Maryland (Bankruptcy Court) on December 14, 2001. You state that in an order dated April 5, 2004 (Confirmation Order), the Bankruptcy Court confirmed Startec's Joint Plan of Reorganization, as Amended and Modified (Reorganization Plan).<sup>1</sup> In a subsequent communication, you state that the effective date of the Reorganization Plan was May 17, 2004. You submit a copy of the Confirmation Order and the Reorganization Plan. Section 1.1.66 of the Joint Plan states that December 14, 2001 "was the date on which each of the Debtors [*i.e.*, Startec, Startec Global Communications Corporation and Startec Global Licensing Company] filed a voluntary petition for relief commencing the Chapter 11 Cases." You contend that Startec no longer owes the amounts at issue because the Commission approved the application to transfer control of international Section 214 authorizations from Startec Global Operating Company, Debtor-in-Possession, to Allied Capital Corporation.<sup>2</sup> You also maintain that the assessed FY 2002 regulatory fee of \$92,765.05 is incorrect. You assert that according to its Form 499, "Startec's revenue subject to the 0.00153 contribution factor for interstate telecommunications service providers was \$45,669,372.00" and that the appropriate regulatory fee amount for FY 2002 is therefore \$69,874.24.

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<sup>1</sup> Startec jointly filed the Joint Plan with Startec Global Communications Corporation and Startec Global Licensing Company.

<sup>2</sup> See *Public Notice*, International Authorizations Granted, 19 FCC Rcd 7875 (dated Apr. 29, 2004).

Your request for waiver of the FYs 2001 and 2002 regulatory fees was not filed with the Commission until long after the close of the fiscal years in question and, therefore, does not provide a basis for relief or otherwise warrant any further consideration. Accordingly, we deny your request for a waiver of the regulatory fees for FYs 2001 and 2002.<sup>3</sup>

With respect to your request for waiver of the FY 2003 regulatory fee, the Commission has determined that it will waive regulatory fees for licensees who are bankrupt or are in receivership at the time the fees are due. *See Implementation of Section 9 of the Communications Act*, 10 FCC Rcd 12759, 12762 (1995). Based upon the evidence that you provide that Startec was in bankruptcy on the date the FY 2003 regulatory fee was due (*i.e.*, September 25, 2003), we grant your request for waiver of the regulatory fee for that year.

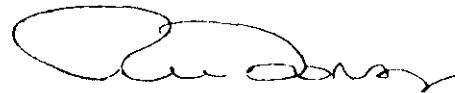
The Communications Act of 1934, as amended, requires the Commission to assess a late charge penalty of 25 percent on any regulatory fee not paid in a timely manner. It is the obligation of the licensees responsible for regulatory fee payments to ensure that the Commission receives the fee payment no later than the final date on which regulatory fees are due for the year. Your request does not indicate or substantiate that Startec met this obligation for FYs 2001 and 2002. Payment of the late charge penalties, as well as the regulatory fees for FYs 2001 and 2002 is now due. The regulatory fees and the associated late charge penalties should be filed together with a Form FCC 159 (copy enclosed) within 30 days from the date of this letter.

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<sup>3</sup> See Letter from Mark A. Reger, Chief Financial Officer (CFO), Office of Managing Director (OMD), FCC, to Rodney L. Joyce, counsel for Network Access Solutions Corporation (Aug. 11, 2004) (denying untimely request for regulatory fee relief for FYs 2000 and 2001 because the request was filed on April 2, 2004, "long after the fiscal years in question"); Letter from Mark A. Reger, CFO, OMD, FCC, to C. Michael Curry, Vice President, Hispanic Keys Broadcasting Corp (dated Aug. 27, 2002) (denying untimely request for regulatory fee relief for FYs 1997, 1998, and 1999 because the request was filed on March 14, 2002, "long after the fiscal years in question"). We point out that the untimeliness in the instant matter is comparable to that in these cited cases. Further, even if your request for waiver of the FY 2001 regulatory fee were not subject to denial as untimely, we reject your request for relief on the grounds of bankruptcy for that year because Startec was not in bankruptcy at the time the FY 2001 regulatory fee was due (*i.e.*, September 26, 2001) since it filed the Chapter 11 petition on December 14, 2001.

You also request that the Commission "remove Startec's Red Light status." Please note that we will address this matter separately from your fee waiver request. If you have any questions concerning this letter, please contact the Revenue and Receivables Operations Group at (202) 418-1995.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Reger", written in a cursive style.

Mark A. Reger  
Chief Financial Officer

Enclosure

DICKSTEIN SHAPIRO MORIN & OSHINSKY

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E-Mail Address: FarberJ@dsma.com

EX-104/2/05  
2 day 1 hr  
Regina

July 8, 2005

RECEIVED - FCC

JUL - 8 2005

Andrew S. Fishel  
Managing Director  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20054

Federal Communication Commission  
Bureau / Office

**Re: Notice of Dispute and Petition for Waiver of Regulatory Fees for Fiscal Years 2001, 2002, and 2003**

Dear Mr. Fishel:

On behalf of Startec Global Operating Company ("Startec" or "the Company"), we hereby submit this notice of dispute and in the alternative petition for waiver of the regulatory fees (and any applicable late charges) that the Commission's records appear to show as owing by Startec for fiscal years 2001, 2002, and 2003. Startec was unaware that the Commission believed that Startec owed any amounts to the Commission until last week when, in the course of preparing to file an application seeking the Commission's approval for Startec's acquisition of the assets of PT-1 Communications, Inc. and PT-1 Long Distance, Inc. (collectively, "PT-1"), Startec checked its "Red Light" status. As discussed below, Startec does not believe that it owes the amounts in question and hereby disputes that it does. Alternatively and in addition, Startec, which entered bankruptcy on December 14, 2001 and remained in bankruptcy until April 2004, hereby requests a waiver from paying the amounts in question due to financial hardship.<sup>1</sup> Accordingly, Startec respectfully requests that the

<sup>1</sup> See, e.g., *Network Access Solutions Corp.*, Letter Order, dated June 7, 2004; see also, *PC Landing Corp.*, Letter Order, dated Jan. 13, 2004 and discussion below.



Commission immediately remove Startec's Red Light status to allow the processing of the PT-1 application, and thereafter, remove from its accounts (either by virtue of expungement or waiver) the three outstanding amounts.

#### **The Nature of the Invoices**

According to the Red Light system, Startec has three separate unpaid amounts outstanding. Copies of the invoices available from the Commission's Red Light system are attached hereto as Exhibits 1a, 1b, and 1c, respectively. According to the payment type code on the invoices available from the Commission's Red Light system, the three amounts are for regulatory fees for interstate telecommunications services providers for fiscal years 2001, 2002, and 2003 (respectively, the "2001 Amount," the "2002 Amount," and the "2003 Amount"). See Exhibits 1a-1c.

#### **The Bases for Startec's Dispute**

The Commission's application of the outstanding fees for the three years in question with regard to Startec is improper for several reasons. First, the 2002 amount is incorrect. According to Startec's Form 499 (attached as Exhibit 2), Startec's revenue subject to the .00153 contribution factor for interstate telecommunications service providers was \$45,669,372. Accordingly, the appropriate regulatory fee amount is \$69,874.24; not the \$92,769.05 that the Commission's records reflect.

Second, on December 14, 2001, Startec filed a voluntary petition for relief under chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Maryland (the "Bankruptcy Court"). On or about April 5, 2004, the Bankruptcy Court entered an order (the "Confirmation Order") confirming Startec's Joint Plan of Reorganization, as Amended and Modified,

dated January 16, 2004 (the "Reorganization Plan"). The Confirmation Order and the Reorganization Plan are attached hereto as Exhibits 3 and 4, respectively. The amounts claimed by the Commission, we understand, are alleged to relate to periods prior to the entry of the Confirmation Order on or about April 5, 2004, and are therefore subject to the terms of the Reorganization Plan.

Under the terms of the Reorganization Plan and the Confirmation Order, the 2001 Amount, which relates to the period prior to the filing of Startec's bankruptcy petition on December 14, 2001, has been discharged. As for the 2002 Amount and the 2003 Amount, they constitute alleged Administrative Expense claims, which Startec disputes. As such, these amounts are not Allowed Administrative Expense claims under the Reorganization Plan, and Startec is not obligated to pay them.

Third, not only do the terms of the Reorganization Plan directly govern the outstanding amounts, Startec's bankruptcy filing is also relevant as evidence of the Company's financial hardship. As you know, the Commission waives a carrier's obligations to pay regulatory fees upon a showing of financial hardship.<sup>2</sup> More specifically, the Commission has determined that a carrier's bankruptcy serves as sufficient basis to establish financial hardship.<sup>3</sup>

Fourth, Startec contends that, to the extent that the amounts in question are otherwise valid obligations, it no longer owes those amounts as the result of the Commission's approval of the application seeking consent to the transfer of control of

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<sup>2</sup> Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, Report and Order, FCC Rcd 5333, 5346 (1994) ("Regulatory Fee Order"), recon., 10 FCC Rcd 12759, 12762 (1995) ("Regulatory Fee Recon Order").

<sup>3</sup> See n.1 above.

the international Section 214 authorizations held by Startec Global Operating Company, Debtor-in-Possession, from Startec Global Operating Company, Debtor-in-Possession, to Allied Capital Corporation. *See International Authorizations Granted, Section 214 Applications; Requests to Authorize Switched Services Over Private Lines; Section 310(b)(4) Requests*, Public Notice, 19 FCC Rcd 7875 (April 29, 2004). The alleged debts were owed at the time of the transfer, which was a transfer of a reorganized entity to allow it to come out of bankruptcy. As discussed above, the Commission's policy is to waive regulatory fees in the case of bankrupt entities. Startec believes that the Commission effectively meant to waive the alleged indebtedness when it allowed the transfer.

#### **Request for Waiver**

In addition to disputing the charges, Startec also hereby requests that they be waived. To the extent that the Commission does not agree that one or more of the allegedly outstanding amounts should be dismissed for the reasons set forth above, Startec believes that waiver is appropriate in light of its financial hardship during the period in question, as evidence by its bankruptcy filing.<sup>4</sup>

\* \* \*


For one or all of the reasons explained above, we request that the Commission immediately remove Startec's Red Light status, and thereafter, cancel the application of the three amounts in question and any associated late charge penalties.

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<sup>4</sup> See n.1 above.

Please feel free to contact Albert Kramer at 202-828-2226 if you have any questions or would like to receive further information in this matter.

Sincerely,



Albert H. Kramer  
Jacob S. Farber

JSF/clh

cc: Regina Dorsey (via email)  
Claudia Pride (via email)  
Mark Reger (via email)

FEDERAL COMMUNICATIONS COMMISSION  
Washington, D. C. 20554

OFFICE OF  
MANAGING DIRECTOR

November 9, 2005

Kent D. Bressie  
Christopher J. Wright  
Charles D. Breckinridge  
Harris, Wiltshire & Grannis LLP  
1200 Eighteenth Street, N.W.  
Washington, D.C. 20036

Re: Tyco Telecommunications (US) Inc. Request  
for Reduction of FY 2004 Regulatory Fees  
Fee Control No. 0408208835752007

Dear Sirs:

This is in response to your request, dated February 25, 2004, filed on behalf of Tyco Telecommunications (US) Inc. (Tyco) for a partial refund of its regulatory fees for its international bearer circuits in fiscal year (FY) 2004.<sup>1</sup> Your request for a partial refund is granted.

In support of the request, Tyco states that it overpaid its regulatory fees by miscalculating the number of 64-KB circuits upon which the fee was based.<sup>2</sup> Tyco indicates two errors. First, Tyco states that it mistakenly paid \$152,409.60 for 60,480 64-KB circuits leased to Viatel, for which Viatel was itself liable and actually paid. Second, Tyco relates that it overpaid the fee for two STM-4 circuits by \$38,102.40. Tyco explains that it erroneously treated two STM-4 circuits as the equivalent of 30,240 64-KB circuits instead of 15,120 64-KB circuits, as it should have. Tyco's total claimed overpayment is therefore \$190,512. Tyco supports its request with a sworn declaration by its controller, Daniel P. Walsh, who confirms that he made the errors indicated, and with other documentation.

Tyco has shown that it is not required to pay any regulatory fee for the circuits it leased to Viatel. Viatel, as a facilities-based common carrier, must pay the fee for the number of active circuits it uses.<sup>3</sup> Tyco is not liable for the fee. See Implementation of Section 9 of the Communications Act, 10 FCC Rcd 12759, 12761 ¶¶ 10-11 (1995).

<sup>1</sup> Letter from Kent D. Bressie, Christopher J. Wright, and Charles D. Breckinridge to Mr. Mark Reger (Feb. 28, 2005).

<sup>2</sup> The FY 2004 fee for international bearer circuits was \$2.52 per 64 KB circuit. Assessment and Collection of Regulatory Fees for Fiscal Year 2004, 19 FCC Rcd 11662 (2004). In a previous letter, we rejected Tyco's claim that the Commission should have collected only \$1.95 for each circuit. See Letter from Mark A. Reger to Kent D. Bressie, Christopher J. Wright, Charles D. Breckinridge (June 30, 2005).

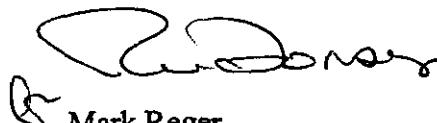
<sup>3</sup> Our records confirm that Viatel paid the fees for these circuits leased from Tyco.

Additionally, Tyco correctly notes that two STM-4 circuits are equivalent to 15,120 64-KB circuits and not twice that number. See International Bureau Report: 2003 Section 43.82 Circuit Status Data (Dec. 2004) at 34; Regulatory Fees Fact Sheet: What You Owe – International and Satellite Services Licenses (Jul. 2003) at 4.<sup>4</sup>

We therefore find that a refund is warranted for the overpayment of the regulatory fees attributable to those erroneous payments. See C.F.R. §1.1160(a)(1). Accordingly, Tyco's request is granted.

A check made payable to the maker of the original check, and drawn in the amount of \$190,512.00 and will be sent to you at the earliest practicable time. If you have any questions concerning this matter, please call the Revenue & Receivables Operations Group at (202) 418-1995.

Sincerely,



Mark Reger  
Chief Financial Officer

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<sup>4</sup> These sources indicate that 1 STM circuit is equivalent to 1,890 64 KB circuits. Thus, four STM circuits are equivalent to 7,560 (4 x 1,890) 64 KB circuits.

0408208835752007

**HARRIS,  
WILTSHIRE &  
GRANNIS LLP**

#7111  
FO WAIVER TRACKING

1200 EIGHTEENTH STREET, NW  
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ATTORNEYS AT LAW

FO WAIVER TRACKING  
CNTL# 611

28 February 2005

**BY FEDERAL EXPRESS  
& ELECTRONIC MAIL**

Mr. Mark Reger  
Chief Financial Operator  
Financial Operations Center  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554  
*Mark.Reger@fcc.gov*

*Re: Request for Refund of Regulatory Fee Overpayment for FY 2004 Due to Tyco's  
Erroneous Tabulation of Active International Bearer Circuits*

Dear Mr. Reger:

Due to an erroneous tabulation of active international bearer circuits ("IBCs") or equivalents for which it owed regulatory fees, Tyco Telecommunications (US) Inc. ("Tyco") overpaid its FY 2004 regulatory fees by \$190,512. Tyco's overpayment stems from two errors. *First*, Tyco inadvertently paid \$152,409.60 in FY 2004 IBC fees for 60,480 64-KB circuits or equivalents that it leased to Viatel, when in fact Viatel bore liability, under the Commission's rules, for the applicable fees and in fact paid them. *Second*, Tyco mistakenly double-counted the capacity on two STM-4 circuits, overstating the total count by 15,120 64-KB circuits or equivalents and, accordingly, overpaying by an additional \$38,102.40. Taken together, these erroneous payments on 75,600 64-KB circuit equivalents justify an overpayment refund of \$190,512 pursuant to Section 1.1160(a)(1) of the Commission's rules.<sup>1</sup>

<sup>1</sup> In an unrelated letter dated January 7, 2005, Tyco requested a refund based on the Commission's overcollection of IBC fees in FY 2004. See Letter from Kent. D. Bressie, Counsel for Tyco, to Andrew S. Fishel, FCC Managing Director (Jan. 7, 2004). As discussed

## I. OVERPAYMENT FOR CAPACITY LEASED TO VIATEL

The first component of Tyco's erroneous overpayment of FY 2004 IBC fees relates to capacity leased to Viatel, a common carrier holding an international Section 214 authorization.<sup>2</sup> Under two separate Orders for Capacity Lease, Tyco leased a total of 60,480 64-KB circuit equivalents to Viatel.<sup>3</sup> Viatel has informed Tyco that it activated only 33,152 of those 64-KB circuit equivalents, and it has informed Tyco that it paid the applicable IBC fee for those active circuits.<sup>4</sup>

On top of Viatel's payment, Tyco mistakenly paid FY 2004 IBC fees of \$152,409.60 covering all of the 60,480 64-KB circuit equivalents it leased to Viatel,<sup>5</sup> even though no fee payment was due from Tyco. Pursuant to the Commission's guidelines, facilities-based common carriers holding an international Section 214 authorization—such as Viatel—must pay IBC fees for all of the active circuits they own or lease.<sup>6</sup> To avoid double-charges on such circuits, the

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*infra*, note 19, the Commission should adjust downward the refund request made in this letter in the event that it grants Tyco's prior refund request. To do otherwise would result in an underrecovery of IBC fees from Tyco.

<sup>2</sup> Viatel Holding (Bermuda) Ltd. holds international Section 214 authorization. See ITC-96-421, ITC-214-19960726-00345 (grant of international Section 214 authorization to Viatel, Inc.); ITC-ASG-20020516-00235 (assignment from Viatel, Inc. debtor-in-possession to Viatel Holding (Bermuda) Ltd.).

<sup>3</sup> Pursuant to a June 2002 Order for Capacity Lease, VTL (UK) Limited d/b/a Viatel leased one STM-16 circuit from Tyco for a term of three years, and pursuant to a September 2003 Order for Capacity Lease, Viatel leased one OC-48 circuit from Tyco for a term of three years. See June 2002 Order for Capacity Lease at 1 (attached as Ex. A); Sept. 2003 Order for Capacity Lease at 1 (attached as Ex. B). An STM-16 circuit and an OC-48 circuit each represent 30,240 64-KB circuit equivalents. See Declaration of Daniel Walsh ¶ 4 ("Walsh Decl.") (attached as Ex. C). In aggregate, therefore, Tyco leased 60,480 64-KB circuit equivalents to Viatel.

<sup>4</sup> Viatel has informed Tyco that VTL Inc., a wholly owned subsidiary of Viatel Holding (Bermuda) Ltd., paid the regulatory fee for these active circuits. The Commission can verify this payment by referring to VTL Inc.'s FCC Registration Number (FRN # 0007707649). Viatel has also informed Tyco that, pursuant to Section 63.21(h) of the Commission's rules, Viatel Holding (Bermuda) Ltd. has notified the Commission that VTL Inc. and another wholly owned subsidiary of Viatel Holding (Bermuda) Ltd. operate circuits under Viatel Holding (Bermuda) Ltd.'s international Section 214 authorization.

<sup>5</sup> See Walsh Decl. ¶¶ 5, 6.

<sup>6</sup> See *Regulatory Fees Fact Sheet: What You Owe—International and Satellite Services Licensees* (July 2003) ("2003 Fact Sheet"), available at <http://www.fcc.gov/fees/factsheets/owe-ib.pdf>.



Commission's guidelines do not impose IBC fee obligations on private submarine cable operators (like Tyco) for any circuits sold or leased to such facilities-based common carriers.<sup>7</sup>

Thus, the Commission's guidelines oblige Viatel to pay the applicable IBC fee, and Viatel has done so. As a private submarine cable operator, Tyco bears no liability for any of the capacity leased to Viatel, a common carrier holding an international Section 214 authorization. (With respect to the capacity that Tyco sold to Viatel and that Viatel had *not* activated, no payment is due from anyone, as the Commission requires payment only with respect to active circuits.<sup>8</sup>)

Tyco's payment of IBC fees for the capacity leased to Viatel amounts to an inadvertent overpayment. Accordingly, pursuant to Section 1.1160(a) of the Commission's rules, Tyco requests a refund of its IBC fee payment of \$152,409.60 covering the 60,480 64-KB circuit equivalents that it leased to Viatel.<sup>9</sup>

## II. OVERPAYMENT DUE TO DOUBLE-COUNTING OF STM-4 CAPACITY

The second component of Tyco's erroneous overpayment of FY 2004 IBC fees relates to Tyco's double-counting of the active capacity on two circuits. Tyco mistakenly treated two STM-4 circuits as one STM-16 circuit when tabulating the number of 64-KB circuits or equivalents for which fees were due.<sup>10</sup> One STM-16 circuit represents 30,240 64-KB circuit equivalents, twice the capacity of two STM-4 circuits (7,560 64-KB circuit equivalents apiece, or 15,120 together.)<sup>11</sup> As a result of this tabulation error, Tyco over-reported its number of active circuits by 15,120 64-KB circuit equivalents, and, correspondingly, it overpaid its IBC fee by \$38,102.40 (*i.e.*, \$2.52 per circuit x 15,120 circuits).<sup>12</sup> Pursuant to Section 1.1160(a) of the Commission's rules, Tyco requests a refund of that overpayment.

<sup>7</sup> See *id.*; *Implementation of Section 9 of the Communications Act – Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, Memorandum Opinion and Order, 10 FCC Rcd. 12,759, 12,761 ¶¶ 10-11 (1995) (explaining avoidance of double-charging).

<sup>8</sup> See 2003 Fact Sheet.

<sup>9</sup> Viatel has informed Tyco that it does not oppose Tyco's request for a refund of these fees. Viatel's outside counsel, Joan E. Neal of Morrison & Foerster LLP, has offered to respond to any questions the Commission may have regarding Viatel's lease of capacity from Tyco and its related IBC fee payments. Ms. Neal can be reached by telephone at (202) 887-8738, or by e-mail at [jneal@mofo.com](mailto:jneal@mofo.com).

<sup>10</sup> See Walsh Decl. ¶ 7.

<sup>11</sup> See *id.*

<sup>12</sup> See *id.* ¶ 8.

### III. REFUNDS OF OVERPAYMENTS

Section 9 of the Communications Act, the Commission's rules, and the Commission's own precedent make clear that the Commission must refund overpayments of regulatory fees, including overpayments due to payments by multiple parties of a single fee liability or due to computation errors. Section 9 of the Communications Act, which authorizes the Commission only to "recover the costs" of regulation,<sup>13</sup> lacks any terms suggesting that the Commission has authority to retain overpayments. Likewise, Section 1.1151 of the Commission's rules recites the Commission's duty "to recover the costs of certain of its regulatory activities,"<sup>14</sup> but nothing in the rules authorizes the Commission to retain overpayments. To the contrary, Section 1.1160(a)(1) of the rules requires the Commission to issue a refund when "no regulatory fee is required or an excessive fee has been paid."<sup>15</sup>

At least three decisions from the Office of the Managing Director ("OMD") clarify that the Commission refunds regulatory fees when the payor has overpaid due to the payor's own miscalculations. *First*, OMD refunded a broadcast station regulatory fee overpayment to Rolling Plains Broadcasting Corporation when Rolling Plains mistakenly paid the fee twice.<sup>16</sup> *Second*, OMD refunded an IBC fee payment to COLT Telecommunications pursuant to Section 1.1160(a)(1) of the Commission's rules after COLT determined that it was not liable for the payment because it was not a facilities-based common carrier.<sup>17</sup> *Third*, OMD refunded a portion of a broadcasting station regulatory fee paid by Eagle Creek Broadcasting after Eagle Creek realized that it had overpaid due to "inadvertent error."<sup>18</sup> As these decisions make clear, the Commission issues a refund in the event that a payor—like Tyco—overpays its regulatory fees due to its own errors in tabulating the fee owed.<sup>19</sup>

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<sup>13</sup> 47 U.S.C. § 159(a)(1).

<sup>14</sup> 47 C.F.R. § 1.1151.

<sup>15</sup> 47 C.F.R. § 1.1160(a)(1).

<sup>16</sup> See Letter from Mark A. Reger, Chief Financial Officer, OMD, FCC, to A. Wray Fitch III and Stephen M. Clarke, Counsel for Rolling Plains Broadcasting Corp. (May 10, 2004) (attached as Ex. D).

<sup>17</sup> See Letter from Mark A. Reger, Chief Financial Officer, OMD, FCC, to Robert B. Kelly, Esq., Counsel for COLT Telecommunications (Jan. 8, 2004) (attached as Ex. E).

<sup>18</sup> See Letter from Mark A. Reger, Chief Financial Officer, OMD, FCC, to John D. Poutasse, Esq., Counsel for Eagle Creek Broadcasting (Nov. 13, 2003) (attached as Ex. F).

<sup>19</sup> In the event the Commission grants Tyco's separate January 7, 2005, refund request, Tyco requests that the Commission revise downward the amount of the refund request in this letter, to \$147,420.

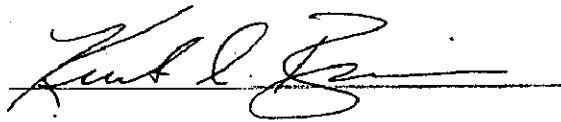
In the January 7, 2005, request, Tyco explained that the Commission overcollected FY 2004 IBC fees by approximately 30 percent by underestimating active capacity on U.S. international routes and establishing an excessive IBC fee. Tyco explained that the

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28 February 2005  
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For the foregoing reasons, Tyco requests that the Commission refund Tyco's inadvertent overpayment of IBC fees. Tyco erroneously paid fees amounting to \$152,409.60 for 60,480 64-KB circuit equivalents it leased to Viatel, and it erroneously paid fees amounting to \$38,102.40 for 15,120 64-KB circuit equivalents that it over-reported due to a calculation error relating to two STM-4 circuits. Accordingly, pursuant to Section 1.1160(a)(1) of the Commission's rules, Tyco seeks an aggregate refund (by check or wire transfer) of \$190,512.

Respectfully submitted,



Kent D. Bressie  
Christopher J. Wright  
Charles D. Breckinridge

*Counsel for Tyco Telecommunications (US) Inc.*

cc: Andrew S. Fishel (OMD)  
Roland Helvajian (OMD)  
Regina Dorsey (OMD)  
David Krech (IB)  
Cathy Hsu (IB)  
Allan Sacks (OGC)  
David Senzel (OGC)

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Commission should have collected only \$1.95 for each 64-KB circuit or equivalent, rather than the \$2.52 per circuit that it actually collected. *See* Letter from Kent D. Bressie, Counsel for Tyco, to Andrew S. Fishel, FCC Managing Director (Jan. 7, 2004).

In this letter, Tyco seeks a refund of \$190,512 based on its erroneous payment of \$2.52 for 75,600 64-KB circuits ( $\$2.52 \times 75,600 \text{ circuits} = \$190,512$ ). In the event that the Commission grants Tyco's separate January 7, 2005, request, however, the Commission will have reduced Tyco's per-circuit payment by approximately 30 percent, to \$1.95 per 64-KB circuit or equivalent. In that case, the refund request in this letter should be adjusted to reflect that lower, per-circuit fee. Thus, if the Commission grants Tyco's separate January 7 refund request, the amount requested in this letter should be reduced to \$147,420 ( $\$1.95 \times 75,600 \text{ circuits} = \$147,420$ ).